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JAMES H. MCKENNEY
Clerk

Supreme Court of the United States.

Brf. of Raegener for Respondent

OCTOBER TERM, 1899.

No. 615.

Filed Mar. 17, 1900.

EMILIE SAXLEHNER,

Petitioner,

vs.

ALEXANDER NIELSEN,

Respondent.

BRIEF ON BEHALF OF RESPONDENT.

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October Term
1899. No. 215.

Brief on Behalf of Respondent.

The above entitled cause comes before this Court upon a writ of certiorari issued to the United States Circuit Court of Appeals for the Second Circuit on March 6, 1899. The questions involved are substantially the same as those raised in the case of this petitioner against Eisner & Mendelson Company and against Siegel-Cooper Company, Rudolph Giess and Louis Marquet, said cases being Nos. 211, 212, 213 and 214 upon this calendar. Upon the original hearing in the Circuit Court, and upon hearing of the appeal, also, this cause was heard, together with said causes, and the opinions of both Courts in this case refer to the opinions of said Courts in those cases. It is urged on behalf of the petitioner that this case should be considered solely upon its own proofs and without any regard whatever to the disposition made by this Court of the principal case against Eisner & Mendelson Company. It is respectfully submitted that this view is erroneous. The petitioner is here seeking to enforce, not a private contractual right, but a mo-

nopoly in derogation of public right, and the principal party in interest is the public itself. To maintain her right she must prove her title at the time of the alleged infringement. If in the other cases this Court should find either that complainant never had any trademark rights in the word "Hunyadi" standing alone or that, having such rights, she had lost the same prior to the time of the alleged infringement, then such finding is *res adjudicata* as against the petitioner, as much so would be any finding of this Court as to her status, and this respondent, as well as all the world, is entitled to rely upon the fact so found.

The facts relating to the adoption of the trademark by complainant's predecessor in business, Andreas Saxlehner, and to the laches and abandonment of such rights as were formerly acquired are fully stated in the opinion in the principal case written by Judge Shipman and reported in 88 Fed. Rep., 61. The opinion of the Circuit Court of Appeals for the Second Circuit (91 Fed. Rep., 536) refers to said opinion in the following words:

> "The opinion of the Judge who heard the cause in the Circuit Court is most careful and exhaustive. The voluminous facts are most fully rehearsed, and an examination of the record shows that they are accurately stated."

Both these opinions, while not printed in the record in this cause, must necessarily be considered by this Court in order to arrive at an understanding of the opinions filed in this cause, which refer to and rely upon them. They will, of course, be found in full in the record in the main case against Eisner & Mendelson Company.

Two main points are involved in this case:

First, had the complainant at the time of the alleged infringement a valid trademark in the word

"Hunyadi" standing alone as denoting the Hungarian bitter water bottled and sold by her and her predecessor?

Second, had the complainant at the time of the alleged acts of infringement an exclusive right to the use of the distinctive style of label used upon the bottles containing the Hungarian bitter water bottled and sold by her?

It is uncontroverted that defendant has used the name "Hunyadi" in connection with the sale of Hungarian bitter waters not bottled and sold by the complainant. It is also uncontroverted that the bottles containing his said bitter waters have borne labels in close imitation, so far as general appearance goes, of those for many years used by complainant.

As to the use of the word "Hunyadi," defendant's contention is: First, that neither complainant nor her predecessor ever had an exclusive right to the use of the word "Hunyadi"; second, that even if she formerly had such right, this right was lost and abandoned by her laches and express declarations, and that long before the use of such name by defendant the word "Hunyadi" had become a general term denoting a class of bitter waters, and that it was so known to and used by the public, and in reliance upon a long undisputed and general use of said word he had innocently used the same in the belief, legally warranted, that he had a right so to do.

As to the use of the label, defendant's contention is that while it is true that this style of label or wrapper was originated by complainant's predecessor and for many years exclusively used by him, yet the same course of laches and declarations by complainant which had made the name "Hunyadi" public property, had likewise made this distinctive label public property, and that the label also had come to be one of the indicia of a class of Hungarian bitter waters, so that the same might honestly be used by anyone dealing in this class of bitter waters, so long as he did not seek to confuse his product

with that of complainant. The bill does not allege, nor does the record show, any confusion except such as may have arisen from the general similarity of the labels.

The Facts.

Andreas Saxlehner, the founder of complainant's business was a native of Hungary, residing at Buda-Pesth. In 1863 he commenced bottling and selling the waters from a mineral spring owned by him. By degrees he added other springs and extended the sale of their waters throughout the world. In 1889 he died, leaving a last will by which he made his wife, this complainant, his successor in business.

To the original spring opened by him Saxlehner had given the name "Hunyadi," and its waters were sold by him under the name "Hunyadi Janos." The name of the well was registered by him in Hungary in 1863 (Complt's Ex. No. 18 p. 79); and that of the water in 1873 (Complt's Ex. 19, 20 and 22, pp. 80–84). As early as 1873 he exported these waters to the United States under the name "Hunyadi Janos," and such exportations have constantly increased. At first they were made by Saxlehner himself, but on February 14, 1876, he made a contract with the Apollinaris Company (Complt's Ex. 4, p. 75), containing, among others, the following provisions:

> "Mr. Andreas Saxlehner abandons to the Apollinaris Company the exclusive sale of his natural Hundadi Janos bitter water in Great Britain, her colonies and dependencies, likewise in all transmarine countries and places, Smyrna excepted, for a term of 10, say ten years."
>
> "Mr. Andrew Saxlehner obliges himself henceforth not to accept orders arriving from the United States, but to make them over to the Apollinaris Company."

By an additional agreement (p. 78) this contract was continued for a further term of fifteen years.

From April 1st, 1876, therefore, until the termination of this contract on March 25th, 1896, the Apollinaris Company was the sole representative of Saxlehner in the United States; was, in fact, his *alter ego*.

Between 1863 and 1895 various other bitter waters were put upon the market in Hungary, bearing the name of Hunyadi, such as "Hunyadi Matyas," "Hunyadi Josef," "Hunyadi Arpad," Hunyadi Vilmos," "Hunyadi Alajos, "Hunyadi Jonas," "Hunyadi Miklos," and "Hunyadi Istvan" (pp. 28–31), and these names were registered by their owners. In or about 1895 the laws of Hungary relative to such registrations was changed, and thereupon the complainant procured the cancellation of the registry of all such marks except hers (pp. 22–23).

Just what was done in Hungary and what possible bearing it can have on the issues in this case is not clear. The principal evidence on these points is the deposition of Kalman Saxlehner, and he is not at all clear as to the legal effect of these acts. Apparently, however, the laws of Hungary prior to 1895 did not recognize a word standing alone as a trademark, and Saxlehner could have had no trademark there in the word "Hunyadi" alone until these laws were changed. Then, as the first user of such name, the trademark rights claimed by him therein were recognized and his competitors were forbidden to use the word.

But for nineteen years before this his water had been sold in large quantities by his consignees, the Apollinaris Company, throughout the United States, under its name of "Hunyadi Janos," and since an early period the same had also been known and called for under the name "Hunyadi" alone. During this same period, however, the various other Hunyadi waters already mentioned as having been

sold in Hungary, had been introduced into the United States and there sold in large quantities under their respective names, and they also had come to be generally known and called for by the name "Hunyadi" alone (pp. 106, 119, 121, 137)

At the time of making the contract with the Apollinaris Company in 1876 Saxlehner designed for the American trade the characteristic red and blue label ever since used and still used upon his bottles in this country (p. 15). All or nearly all the other Hunyadi waters, afterwards introduced here, bore substantially similar labels (pp. 35–36), (Complts. Ex. 13). Saxlehner's experience in Hungary with these labels was much the same as with the word "Hunyadi" (pp. 34-36).

Saxlehner was, no doubt, the first to introduce into this country a bitter water bearing the name "Hunyadi" and wrapped in the red and blue label, and his use of both has since been continuous and uninterrupted. If no acts of laches, acquiescence or abandonment had intervened the complainant would undoubtedly be entitled to-day to the exclusive enjoyment of both name and label.

But between the time when Saxlehner's bitter water was introduced into this country and the time when defendant commenced to sell his Hunyadi water various other bitter waters, as already stated, had been introduced into this country, all bearing the characteristic red and blue label (See testimony of Kalman Saxlehner and Isidor Haldenstein, Rec. pp. 35 and 36 and 116–122. See also Complainant's Exhibit No. 13, American Labels, and Defendant's Exhibit Haldenstein Table). The importation of these other Hunyadi waters commenced about 1886 and continued steadily until about 1896, and the same amounted to many thousands bottles (See Haldenstein Table, p. 149). During this same period Charles Graef & Co., the New York representatives of the Apollinaris Co., Saxlehner's sole agents in this country, sent broadcast

throughout the United States the circular found on page 150 of the Record, in which these words are found:

> "The word 'Hunyadi' having become a generic name for Hungarian bitter waters, good, bad or indifferent, the Apollinaris Co. affixed to the bottles of Hunyadi Janos or Hungarian bitter water, of which they have still the sole sale, a small yellow label with their red diamond, the object of this trade-mark being only to indicate to the public that the bottle so labeled is sold by the Apollinaris Co., Ltd."

This circular was distributed by mail to the trade to the extent of several thousand during the period from 1893 to March, 1896 (Rec., pp. 120, 121), and shows conclusively that the Apollinaris Co., at least, was thoroughly conversant with the wide-spread use of the word "Hunyadi" and the red and blue labels as applied to Hungarian bitter waters other than those of complainant, and that it acquiesced in such application by others, and by this circular formally abandoned the claim to an exclusive right to the use thereof. Such abandonment, it is urged, is imputable to the complainant, since by complainant's own act the Apollinaris Co. was her sole agent and had complete control over the business in the United States.

This record further shows that complainant and her predecessor were themselves actually aware of these facts.

Kalman Saxlehner (Rec., pp. 36, 37) states that the reason why his father or his mother did not institute suit earlier in this country against alleged infringers of their trade-mark label was that they were on bad terms with the Apollinaris Company, and further states that he knew all these matters at the time and later on heard the conferences which were held with complainant's lawyers.

Haldenstein (Rec., p. 119) also testifies, speaking of certain actions brought by the Apollinaris Company, that he was informed that Andreas Saxlehner was requested to assist in the prosecution of said actions.

Furthermore, as the record in the Eisner & Mendelson case shows and as is shown by the opinions of the Circuit Court and the Circuit Court of Appeals in that case, this information of Haldenstein was correct and these suits were voluntarily discontinued and the injunctions granted therein were dissolved upon the consent of the Apollinaris Company. These acts, taken together, undoubtedly show acquiescence in these numerous alleged infringements and a complete abandonment by the Apollinaris Company, with the knowledge and consent of Saxlehner, of the position that it had any exclusive right to the use either of the word "Hunyadi" or of the red and blue label. The Circuit Court of Appeals was correct in so construing these acts.

All these acts of laches, acquiescence and abandonment took place long prior to the alleged infringement by defendant, which, so far as the record shows, commenced at or about the time when he was notified in October, 1896. At this time the use of both name and label by other importers of Hungarian bitter water had continued for ten years practically without remonstrance from complainant, and later, as already stated, with the entire acquiescence of complainant and her agent. Under these circumstances the defendant had a right to rely upon such acquiescence and upon the formal declaration of abandonment contained in the Graef circular and evidenced by the removal of the injunctions formerly obtained. The defendant, therefore, in his use of both the name and label, acted with entire good faith and cannot be accused of willful fraud.

The Circuit Court found the defendant guilty of intentional fraud in the use of the label, but this

finding was reversed by the Circuit Court of Appeals. The record conclusively shows that the defendant did not adopt or originate this label, but that it was originated by Louis Schmidthauer in Hungary, where he then had the full legal right to use the same and where he registered it as a trademark according to law in July, 1892 (see Complainant's Exhibit No. 15, Rec., p. 94). The Circuit Court was undoubtedly misled by the testimony of defendant's former parter Pollitz in answer to 22 Q. (Rec., p. 54); but the Exhibit No. 15 just referred to conclusively shows that the defendant had nothing to do with the originating and adoption of this label, and the cross-examination of this witness (Rec., pp. 54, 55) shows that the use of both name and label by the defendant was innocent and in reliance upon the well-known generic character of both. In fact, the testimony of this witness (p. 53) shows that the water was imported under this label and that it was then considered necessary to use such label in order that the public might know that this water was a Hungarian bitter water (p. 55). It must be remembered that defendant's label bears his own name prominently and is similar to complainant's only in its general characteristics.

Complainant's Trademark is not the word "Hunyadi" alone, but the two words "Hunyadi Janos."

Under the Hungarian law the word "Hunyadi" was not complainant's trademark until the year 1896, even if under the Minister's Ukase it has been her trademark since that time. The mere fact that many other dealers in Hunyadi waters were permitted for many years to register as part of their trade name the word "Hunyadi," and were permitted for many years to deal undisturbedly in different Hunyadi waters in Hungary and all parts of Europe, proves that complainant and her predecessor had no monopolistic right in the word

"Hunyadi," and that that word was not a trademark. Kalman Saxlehner himself testifies (pp. 22–23) that not until 1895 was it possible under the laws of Hungary for complainant to have a trademark there in the word "Hunyadi."

The subsequent change of the Hungarian laws and the cancellation of the other Hunyadi marks cannot affect this question.

See

Hohner vs. Gratz, 50 Fed. Rep., 369.
Richter vs. Anchor Remedy Co., 52 Fed. Rep., 455.

But the word "Hunyadi" standing alone was never complainant's trademark. According to the certificate, found on pp. 80–81, Andreas Saxlehner registered in Hungary ten years after the sale and introduction of his bitter water into the markets of the world his trademark as Hunyadi Janos and not as Hunyadi.

It is true that we find on p. 98 a copy of Saxlehner's United States registered trademark. Registration for this trademark was applied for on November 12, 1886, that is, ten years after Saxlehner's rights, whatever they were in this country, had become vested and after the sale of his waters in this country. This certificate contains the following statement: "The trademark consists essentially of the said word-symbol 'Hunyadi' without regard to any one or more of the parts and features aforesaid in connection with which it has been used."

At this time, in 1886, there were numerous Hunyadi waters sold throughout the markets of the world. In a patent case a reissue under such circumstances would be invalid, for the reason that the rights of others having intervened the scope of the monopoly could not be broadened. So Saxlehner, after solemnly asserting in Hungary in 1873 that his trademark consisted of the words

"Hunyadi Janos," ought not to be permitted in 1886 to say that his trademark was the word "Hunyadi" standing alone.

As a matter of fact, the various certificates from Hungary show that the name of the spring was "Hunyadi," and that since 1865 the water was brought into commerce under the name of "Hunyadi Janos." In this connection the solemn statement made by Saxlehner in his last will and testament (p. 59), must not be overlooked; he says on November 24, 1887, long after the registry of his United States trademark, "I transfer exclusively to my beloved wife all my rights concerning my 'Hunyadi Janos' Bitter Water trademark, as well as those concerning the trademarks 'Kossuth,' 'Arpad,' 'Hunyadi Janos,' 'Hunyadi Erzsebet.'"

It seems to us that this is very strong evidence in support of our point that Saxlehner never claimed the word "Hunyadi" standing alone as his trademark, and the fact that he himself baptized another water "Hunyadi Erzsebet" goes to show that he himself considered the word "Hunyadi" to be a descriptive adjective, meaning Hungarian bitter water.

We believe that in accordance with the decision rendered by the Supreme Court of the United States in Corbin *vs.* Gould, 133 U. S., 308, Saxlehner is restricted to the trademark by him registered in Hungary in 1873, to wit, to the words "Hunyadi Janos."

See likewise, to the same effect, Richter *vs.* Anchor Remedy Co., 52 Fed. Rep.. 455.

The conduct of complainant and her predecessors and agents is such as to disentitle her to any relief in equity.

If complainant's conduct, as is contended, amounts to abandonment, there can be no question that she

has no standing in this Court. But even if it be held not to amount to positive abandonment, yet her laches has been so great and so general that she should not now be heard to demand an injunction against this defendant.

Mutual Life Ins. Co. *vs.* Austin, 168 U. S., 685, 691–701 (authorities discussed).

Gildersleeve *vs.* New Mexico Mining Co., 161 U. S., 573, 578–582.

Abraham *vs.* Ordway, 158 U. S., 416, 420–423.

Leggett *vs.* Standard Oil Co., 149 U. S., 287, 294.

Menendez *vs.* Holt, 128 U. S., 514.

From what has already been said it is very evident that whatever rights the complainant or her predecessor had in this word must begin with the introduction of the Hunyadi Janos water into this country by the Apollinaris Company. That was in 1876. Within a comparatively short period thereafter, as early as 1879, the markets of the world were flooded with different Hunyadi waters, and consequently the word "Hunyadi" ceased to mean the complainant's bitter water, even if it had ever meant that for a very short period anywhere in the world. The trade in these different Hunyadi waters having steadily increased in this country, not only do the complainant and her predecessor do nothing to assert their rights for years, but their *alter ego*, the Apollinaris Company, who made the word "Hunyadi Janos" a trademark in this country, if it ever was one, by their admission that the word had become a generic term, dedicate it to the public. That admission having been published broadcast throughout the country (and that was true at the time it was made there can be no doubt), complainant now asks this Court to interfere, and this interference is asked for,

after various dealers in Hunyadi Lajos, relying on the undisturbed use of the word Hunyadi by many others for many years, relying on the published statements of the complainant's representatives, have built up a business which began in 1892 with the importation of 667 cases, and had increased in 1895 to 5,148 cases (p. 149).

We believe that the logical, legal conclusion is that the word "Hunyadi" was abandoned to the public, and that the complainant and her predecessor have been guilty of such laches that she is now estopped from claiming the word "Hunyadi" as a trademark, even if it ever was such.

Inasmuch, therefore, as the complainant's right to the trademark in this country is based exclusively upon the acts of the Apollinaris Company in the introduction of complainant's bitter water and use of her trademark, she ought to be bound by all the acts of the Apollinaris Company during the continuance of their contract If the doctrine of agency is to be invoked to establish a trademark, it may equally be invoked to destroy it. This seems to be the substance of the decision of Judge Shipman, viz., that the Apollinaris Company, having become the assignee for the time being of Saxlehner's trademark, abandoned the same to the public and allowed it to become a generic name for Hungarian bitter waters. Abandonment may be shown as well by a course of conduct as by an express declaration.

It may be that the evidence of abandonment in this record is not as strong as it might be, but several other suits of this kind by this complainant against various defendants, notably the case against Eisner & Mendelson Co., are also before this Court, and the decision of those cases must have some bearing upon the decision in this case. If the evidence in those cases is sufficient to satisfy the Court that whatever rights complainant may have had in the word "Hunyadi" as a trademark for her

bitter waters, have been abandoned, and that this word has become a generic term, we think this defendant is entitled to the benefit of that conclusion. If in those cases the Court concludes that at the time when this defendant used the name complained of said name was already abandoned as a trademark and had become a generic term, that is *a fact* of which the Court in this case would take judicial cognizance.

There is, however, another reason why the word "Hunyadi" ceased to be a trademark, if it ever was one. In 1863 the word "Hunyadi" meant, as it is claimed, the bitter water from one certain spring.

Between 1870 and 1880 many new springs were opened upon Saxlehner's land. At present it means the water taken from any one or more of 112 wells located at different points within a plot of ninety acres of land. What at one time in 1863 meant the water of one certain well baptized "Hunyadi" has come to mean a mixed product containing certain salts in fixed proportions and having certain defined qualities.

We fail to see where the line is to be drawn, if the complainant has the right to mix up the waters of different wells located say one mile from the original Hunyadi spring, while others whose wells are located say fifty miles from the original Hunyadi spring have not the same right to call their bitter water Hunyadi, when, as a matter of fact, both are bitter waters having substantially the same ingredients.

If it is not a fraud upon the public in the one case it is not in the other. If it is a fraud in the complainant's case then she has lost her right to relief, and if it is not a fraud, then it is a concession that Hunyadi and Hungarian bitter water are synonymous terms.

There is still another reason in our judgment, why complainant has lost her right to the sole use

of the word "Hunyadi," if she ever possessed it, owing to the laches of which she and her predecessor were guilty.

What is a trademark? It is not a perpetual monoply under all circumstances. In the case of trade names like Singer, Linoleum, Castoria, used upon patented articles, the monoply ceased upon the termination of the patent, for the reason that the public having become accustomed to the trademark for many years and having been educated to recognize the articles under these names exclusively during the life of the patent, know no other name by which to designate the article.

So, in cases of this kind, where one adopts a name (and let us assume it is a valid trademark in its inception), and then for many years permits the public to be educated into the belief that the name is no longer the commercial signature of any particular trader, but is the name of the thing, then the monoply, if ever there was any, is voluntarily surrendered.

It is urged on behalf of complainant that no failure or delay to prosecute one infringer can be availed of by others, but that laches can be predicated only in regard to the specific infringement complained of. This might well be so if the question were of one contract or one relating to the parties alone; but in a trademark case such as the present, it would seem that the tort complained of is more analogous to a trespass upon lands where a right of way is claimed by the trespasser and where a long acquiescence in former trespasses by others gives rise to the presumption that a right of way has been granted. So, here, in regard to the word "Hunyadi," the defendant claims that he had a right to rely upon the failure of the complainant to object to the long continued and indiscriminate infringement of others, and to conclude that he also might use this word as it was used by

a large class of dealers, and by the public generally. So, also, as to the label.

Even if an injunction be granted, the complainant is not entitled to an accounting or to costs.

The laches of complainant and her predecessor in permitting the use of the word "Hunyadi" for a period of over ten years by numerous dealers in different Hunyadi waters disentitles her to an injunction and accounting.

See

Richardson vs. D. M. Osborne & Co., 82 Fed. Rep., 95.
Manufacturing Co. vs. Garner, 55 Barb., 151.
Clarke Thread Co. vs. Armitage, 74 Fed. Rep., 936.
Coats vs. Merrick Thread Co., 149 W. S., 562.

In Richardson *vs.* D. M. Osborne & Co., *supra*, Judge COXE said: "If this action can be maintained a patentee has simply to pocket his patent, wait until the field is full of infringers and begin his suit two months before the patent expires. When charged with laches he has simply to assert that until he commenced his suit he thought the chances of success dubious, and, therefore, did not call the infringers to account. It is plain that the public rights cannot depend upon considerations so shadowy, unilateral and inequitable. Unless the Court is prepared to say that the defense of laches will no longer be enforced in a patent suit it must find for the defendant on this issue. The law of laches is so well understood that it is unnecessary to restate it. It is thought that no case can be found excusing such delay as this record discloses" (see McLean *vs.* Fleming, 96 U. S., 245, and the numerous other cases cited).

In the case of Coats *vs.* Merrick Thread Co., in 149 U. S., 562, Justice BROWN said, page 573: "Indeed, the intent to imitate plaintiffs spool-heads, if any such intent existed, is manifest rather in the label than in the periphery, but plaintiffs having submitted to this without protest for twelve years, have waived their right to relief upon this ground." The Court quotes with approval the decision of McLaughlin *vs.* People's Railway Co., 21 Fed. Rep., 574, which was a patent case in which the plaintiff was guilty of such laches that the Court held that his conduct disentitled him to an injunction and accounting.

The Hunyadi Label.

The same cause of reasoning which has been applied to the question of complainant's trademark in the word "Hunyadi" is applicable also to the question of complainant's exclusive right to the use of her label. The testimony, both complainant's and defendant's, shows that for many years past, in fact almost since the very introduction of complainant's bitter waters into the markets of the United States, many other bitter waters have been sold here bearing labels very much resembling complainant's label, and certainly as much simulations of that label as is the label of defendant, and all this without a word of protest from the complainant. Complainant's own witness, James Pollitz, testifies (page 55), in speaking of the label used by defendant, that at the time when this label was first used by him the word "Hunyadi" had already become a generic term for Hungarian bitter waters and that the red and blue label had already become a characteristic of all Hungarian bitter waters, and that people would not recognize the water as a Hungarian bitter water unless it bore that label; also that

there were at that time various other Hungarian bitter waters in the market bearing the same red and blue label. And in answer to a most strongly leading question by complainant's counsel the same witness stated (pages 55–56) that his firm did not consider the Hunyadi Lajos label of the defendant an imitation, saying, "it looked very much like it, but we did not consider it an imitation because nobody objected to it." While the witness's conclusion is not particularly logical, his statement that nobody objected to the label is important and is binding upon the complainant.

Although the main contention of the complainant has been as to the use of the word "Hunyadi" and the evidence as to the label is somewhat slight, yet it clearly appears that the use of the one by competitors was almost invariably coupled with the use of the other. This is shown principally by complainant's own witnesses and exhibits. It would certainly seem, therefore, that the same rules should be applied to this question of the label as are applied to the question of the trademark and if the complainant is held to have lost her exclusive right to the word "Hunyadi" through her laches, it would equally seem that the same laches would preclude her from claiming an exclusive right to the peculiar form of label which, as one of her own witnesses has testified, was generally characteristic of Hunyadi bitter water.

If the decision of the Courts below as to the use of the word "Hunyadi" be sustained, there is still a further reason why no accounting or damages for the use of the label complained of should be decreed. Throughout this case complainant has proceeded upon the theory that she had a trademark in the word "Hunyadi"; that it was this trademark which was valuable to her and aided in selling her bitter water. There is no evidence whatever as to the value of the label to her and there is no evidence of any honest confusion between

her label and the defendant's label. Whatever part of defendant's profits could in any way have been due to his use of the label complained of must have been so minute as to be practically impossible to ascertain. In any event his willful use of this label could only have been during the period between October, 1896, when he received the notice from the complainant, and May, 1897, when he discontinued the use of the label, and in the absence of fraud on his part it would be unjust and inequitable to impose upon him the expense of a long and costly accounting in the attempt to discover the almost infinitesimal profits which might have been derived by him during this exceedingly short time from the use of said label.

The Defendant is not guilty of Intentional Fraud.

There is no evidence whatever that defendant designed or adopted the label complained of. In fact the evidence shows (p. 53) that the bitter waters sold by him bore this label when imported. Furthermore, the testimony of his former partner, Pollitz, one of complainant's witnesses, clearly shows that at the time when his use of this label began he believed he had a right to use it. Various bitter waters bearing the name "Hunyadi" and bearing labels almost exactly similar to defendant's label (Complainant's Exhibit 13) were then and for a long time had been upon the market, and no objection was made by anyone. In fact the defendant considered that it was necessary to use such a label in order to let the public know that his water was a Hungarian bitter water (pp. 54–55).

This defence is not merely specious but has substantial merit. It would certainly be reasonable for a dealer in champagne to-day to say that it was necessary for him to put up his champagne in a

certain form, in order that the public might know what it was. He would undoubtedly have great difficulty in selling it if he put it up in gin bottles. It is equally so with many products. The form in which they are dealt out to the public is an old and well known form which every dealer in those products is entitled to avail himself of. Someone must have originally adopted this form; but after many others have also adopted and used it without any objection from the originator, there is certainly nothing fraudulent or dishonest in a newcomer assuming that any exclusive right which the first inventor or user of this form might have had has been abandoned, and that he is free to use this form of package or wrapper. So, in the case of this defendant, the form of bottle, the word "Hunyadi" and the red and blue label had long been generally used in the trade, and had become well known as indicia, not of complainant's Hunyadi Janos water alone, but of all Hungarian bitter waters generally. The defendant thereupon received from Hungary an invoice of Hungarian bitter water put up and enclosed in such bottles and labels, and sells the same here in full confidence and with a reasonable belief that he has a right so to do. There is no fraud here. If defendant infringed at all upon complainant's rights, he did so innocently. In fact as soon as he was notified of complainant's claims and had reasonable opportunity to investigate the same, he voluntarily discontinued the use of the label complained of. This matter of fraud, it seems to us, is material upon the question of an accounting, in case the Court should find that the complainant is entitled to an injunction against the use of the label.

Conclusion.

No fraud of defendant has been shown.

Complainant's laches, acquiescence and abandonment have been such as to disentitle her to any injunction, much less to an accounting, damages or costs.

The cause should, therefore, be remanded, with instructions to dismiss the bill.

Respectfully submitted,

LOUIS C. RAEGENER,
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